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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-906

* * *

J. LOYD PARKER, JR.,
Petitioner,

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 498 F.2d 625; A copy

of that opinion appears at Appendix 1, pp. 1a-10a of the Petitioner's Application for Writ of Certiorari.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was rendered on August 5, 1974. The Motion for Rehearing En Banc was overruled on October 24, 1974. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is correctly invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. Respondent submits that these questions may be restated and summarized as follows:

Where the Texas statute in effect at the time of a pre-trial hearing on the competency of Petitioner provided that the jury hearing such issue shall in their verdict state whether the defendant was sane or insane at the time of the commission of the alleged offense and whether the defendant is sane or insane at the time of trial and where retained counsel elects to submit only the question of insanity at the time of trial to such jury, does such failure to submit the issue of insanity at the time of the commission of the alleged offense constitute a deprivation of due process in violation of the XIV Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the XIV Amendment of the Constitution of the United States is involved herein as well as Article 932(b) of the Texas Code of Criminal Procedure in effect in 1963. The petition at page 3 sets out these provisions.

STATEMENT OF THE CASE

Petitioner was accused of the murder of his father on May 2, 1963. On July 22, 1963, Petitioner was found by a jury to be incompetent to stand trial. Petitioner was thereupon committed to a state mental hospital at Rusk, Texas where he remained until 1969.

On May 19, 1969, a jury found Petitioner to be sane.

On June 16, 1969, the trial on the murder charge began. On June 18, 1969, the jury returned a verdict of guilty, and assessed the punishment at ten years confinement in the state penitentiary.

Petitioner appealed to the Texas Court of Criminal Appeals and that Court affirmed the judgment of conviction on April 29, 1970. Parker v. Texas, 457 S.W.2d 638 (Tex.Crim.App. 1970) Appendix VII to the Petition.

He then filed a petition for writ of habeas corpus in federal court, but such petition was dismissed for lack of exhaustion.

He next filed a petition in the Texas court system, but relief was denied on the merits after a full evidentiary hearing by the state habeas judge. This decision was affirmed by the Texas Court of Criminal Appeals. Ex Parte Parker, 485 S.W.2d 585 (Tex. Crim.App. 1972) Appendix VIII to the Petition.

He then returned to federal court with a petition for habeas corpus; the district court found the facts fully developed by the state habeas hearing (Appendix IV and V to the Petition); and the Court of Appeals affirmed the judgment of the district court. Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974) Appendix I to the Petition.

At each step of the way Petitioner asserted some thirteen grounds for relief. At each step of the way these thirteen grounds for relief were found by both state and federal courts to be without merit. Among the thirteen grounds for relief were contentions which are but variations of the contentions asserted in the instant application, viz:

a. That he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States where his retained counsel chose to submit only the issue of competency to stand trial at the 1963 sanity hearing.

b. That he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States where his retained counsel

never raised the issue of insanity at the time of the commission of the offense.

c. That he was denied his right to be represented by effective counsel where his retained counsel failed to submit the issue of insanity at the time of the commission of the offense.

ARGUMENT AND AUTHORITIES

Petitioner was not denied due process in violation of the XIV Amendment of the Constitution of the United States where the Texas statute in effect at the time of a pre-trial hearing on the competency of Petitioner provided that the jury hearing such issue shall in their verdict state whether the defendant was sane or insane at the time of the commission of the alleged offense and whether the defendant is sane or insane at the time of trial and where retained counsel elects to submit only the question of insanity at the time of trial to such jury.

It should at once be noted that Petitioner nowhere asserts his 1969 conviction for murder of his father to be in any way defective. He asserts only that he was denied due process in his 1963 sanity hearing. It should be emphasized that at the time of his 1969 trial for murder, the Petitioner had been adjudicated to be then sane. His defense counsel testified at the state habeas hearing that he had an

insanity defense ready. Ct. Apls. App. 240. He had four psychiatrists and a series of lay witnesses. The psychiatrists were prepared to say that based upon their examination of him at a much later time that they would make a medical deduction and express the opinion that based on their new findings that he was at the time of the commission of the offense of unsound mine. Ct. Apls. App. 248. The psychiatrists who were available in 1963 were vulnerable on cross examination. Ct. Apls. App. 239. After Petitioner had been committed to Rusk, it was a full year before he was found to be insane and that was a matter of medical record. Ct. Apls. App. 239. There were many other reputable, knowledgeable people, who could have testified that the Petitioner knew the difference between right and wrong and understood the nature and consequences of his act. Ct. Apls. App. 241.

After the state rested and after taking all of the foregoing factors into account, the trial defense counsel discussed the matter with Petitioner, Petitioner's wife and his co-counsel. It was mutually agreed by all that they would not present any evidence at all. It was concluded that presenting testimony would not improve Petitioner's situation. Ct. Apls. App. 242 - 243.

Thus, at the time of the trial on the merits, a time when Petitioner was legally sane, he participated in making a decision to present no evidence of insanity at the time of the commission of the offense.

Pate v. Robinson, 86 S.Ct. 836, 383 U.S. 375

(1966) addresses itself only to the competence to stand trial, not to insanity at the time of the commission of the offense. Although trial defense counsel urged the trial court that accused Robinson, should be found not guilty by reason of insanity at the time of the offense, this Court did not write at all on that defense. This Court concluded its opinion by saying that if Robinson were found to be competent to stand trial, he would have the usual defenses available to an accused. 86 S.Ct. at 843, 383 U.S. at 387.

Another defense lawyer, Mr. Fred Fick, testified at the state habeas hearing that the decision not to submit any evidence on the issue of insanity at the 1969 trial on the merits was made after full discussions between Mr. Alexander, Petitioner, Petitioner's wife and himself. All concurred. Ct. Apls. App. 175 - 176.

Mr. Charles Tessmer testified that he was the trial defense counsel at the 1963 sanity hearing. Ct. Apls. App. 222 - 223. He testified that the decision to submit only the issue of insanity at the time of trial was a matter of trial strategy. Ct. Apls. App. 229. He also testified that with the quality of the evidence available to both the defense and the state he had no guarantee or assurance that he would win on the issue of insanity at the time of the offense.

Only one psychiatrist, Dr. Eudaly, has testified in any of the habeas hearings. In the state habeas hearings he testified (Ct. Apls. App. 187 to 221) that he examined the Petitioner on May 14, 1963, and that in his opinion Petitioner was psychotic on the day of

the killing but that he was competent on the day he interviewed him. With this type of evidence the court would have lacked jurisdiction to entertain any pre-trial determination of insanity. Even in 1963 pursuant to the provisions of Art. 932b, jurisdiction could be invoked only by a motion or request therefore based upon allegations that because of present insanity (Emphasis supplied) the defendant was unable to prepare a rational defense to the main charge. State v. Olsen, 3605 S.W.2d 398 (Tex.Sup. 1962). A close examination of the remainder of Dr. Eudaly's testimony will reveal that he was indeed vulnerable on cross examination. He vacillated considerably; he had been practicing psychiatry for only nine months and had never before examined a person charged with a criminal offense. Ct. Apls. App. 207.

While the petition assumes as its major premise that the Petitioner was insane at the time of the killing, it can be seen from the foregoing that this premise has never been established or found in any proceeding to this date.

Much is made of the fact that the district attorney in 1963 believed Petitioner to be insane at the time of the killing. Ct. Apls. App. 137. He was not, however, the District Attorney at the time of the trial on the merits in 1969. Ct. Apls. App. 128. Petitioner attempts to equate this belief on the part of the District Attorney in 1963 to the case in which the prosecution agrees to make no recommendation on the sentence and later recommends the maximum one year sentence, Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971), or the

case in which the prosecutor withholds evidence reflecting upon the credibility of the principal prosecuting witness. Giglio v. United States, 405 U.S. 150, 92S.Ct. 763 (1972). Certainly the conduct of the prosecutors in Santobello and Giglio is a far cry from a lay opinion on the part of the District Attorney that Petitioner was insane. No deception was practiced upon Petitioner. The man who actually prosecuted Petitioner held a different view. Ct. Apls. App. 256-257. At least the evidence shows only a disagreement between two men regarding the insanity of Petitioner at the time of the killing.

Prior to 1937 there was no legal procedure, statutory or decisional, by which a trial court could try the issue of insanity at the time of the act in a pre-trial hearing in advance of a trial on the main charge. In 1937 the Texas Legislature enacted Art. 932a, Vernon's Annotated Code of Criminal Procedure. Like its successor, Art. 932b, Art. 932a provided for a pre-trial determination of both issues of insanity. State v. Olsen, supra. As Judge Woodley formerly Presiding Judge of the Texas Court of Criminal Appeals points out, even a trial of both issues of insanity in a preliminary trial, can lead to a strange situation.

> "* * * So it is now possible for one charged with a criminal offense to be acquitted, though he has never been tried for such offense and in fact to be acquitted by a jury that has not heard the indictment read, the facts relating to the act charged, or any other evidence other than that relating to the question of the sanity or in-

sanity of the accused."

Insanity As A Bar To Criminal Prosecution by K. K. Woodley, Judge of the Court of Criminal Appeals, 3 South Texas Law Journal 204.

In 1965 the Legislature enacted Art. 46.02, Vernon's Annotated Code of Criminal Procedure, which provided only for the trial of the issue of insanity at the time of trial in advance of the trial of the main charge. See Newton v. State, 509 S.W. 2d 610 (Tex.Crim.App. 1974).

Thus the Legislature eliminated the practice of determining the issue of insanity at the time of the act in advance of the trial on the main charge by repealing Art. 932b and enacting Art. 46.02. Even if Petitioner were retried today he would not be entitled to that which he asserts to be a deprivation of due process.

It cannot be overemphasized that Petitioner nowhere attacks the validity of his 1969 trial and conviction. Curiously, he attempts to elevate the simple belief of the 1963 District Attorney to sinister and gross proportions that infect a pre-trial procedure. As the court below has observed, even though the state in 1963 had an affirmative duty to submit the issue of insanity at the time of the act to the competency jury this is a matter of state law and does not amount to a constitutional mandate. Appendix to the Petition, p. 6a.

If there were statutory defects in the 1963 competency hearing these defects became moot

when he was convicted on the main charge in 1969. Petitioner was only entitled to a fair trial and there is no evidence that he did not have a fair trial. Sheldon v. Nebraska, 401 F.2d 342 (8 Cir. 1968). See also Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 768 (1952).

Finally, it is evident from the testimony of trial defense counsel, both at the 1963 hearing and at the 1969 trial, that the decision not to go into the sanity of the accused at the time of the commission of the offense was knowingly and deliberately made. Such decision was a matter of trial tactics made by competent counsel and does not give rise to a federal constitutional question. Brewer v. Peyton, 302 F.Supp. 740, (U.S.D.C., W.D. Va. 1969), affirmed 431 F.2d 1371 (4th Cir. 1970), cert.den. 401 U.S. 994 (1971).

It is also readily apparent that the failure to raise the issue of insanity at the time of the commission of the offense constituted a waiver of such defensive matter in the trial of the main charge. Under these circumstances, the case is, in all essentials, the same as that in Merlo v. Texas, 441 F.2d 729 (5th Cir. 1971) As in Merlo there is no showing that Appellant asked to have the issue of insanity raised at trial. The question of insanity at the time of the offense was a defensive issue which the defense counsel knowingly waived, a strategical move approved in Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), cert.den. 393,U.S. 986, 89 S.Ct. 461 (1968). In Daugherty the court held that there was no evidence justifying a sanity hearing even though the judge was made aware of the defen-

dant's mental history. The Daugherty decision cited the test for competency to stand trial as whether or not the defendant had the ability to consult with his lawyer with a reasonable degree of rational understanding and whether or not the defendant had a rational and factual understanding of the proceedings.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, hereby certify that a true and correct copy of the above and foregoing Brief For Respondent In Opposition has been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of April, 1975, addressed as follows: Isaac N. Groner, Cole and Groner, P. C., 1730 K. Street, N.W., Washington, D.C. 20006.

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